Filed 4/26/06 P. v. Lamont CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY PATRICK LAMONT, Defendant and Appellant.	E037891 (Super.Ct.No. FCF002078) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. J. Michael Welch, Judge. Affirmed.

Jeffrey J. Stuetz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Lynne G. McGinnis, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Following a jury trial, defendant was convicted of first degree residential robbery (Pen. Code, § 211;[1] count 1) and assault with a deadly weapon, a knife (§ 245, subd. (a)(1); count 2). The jury also found that defendant personally used a firearm in count 1 (§ 12022.53, subd. (b)) and had one prior strike conviction (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)). Defendant was sentenced to 20 years in prison, and appeals. He contends that: (1) the trial court erroneously failed to instruct sua sponte on the lesser included offense of theft in count 1; and (2) insufficient evidence supports the jury's true finding on the personal use enhancement in count 1. We find each contention without merit, and affirm.

FACTS

In April 2004, Nicholas Chatterton lived alone in a house in Lake Arrowhead. On April 21, at approximately 5:00 a.m., he woke to the sound of a loud knock on his front door. He got up from the couch where he was sleeping, turned on the lights, and opened the front door. Defendant and another man "rushed" into the house. Defendant pointed a gun at Chatterton's head and punched him in the face. He told Chatterton he owed him money and said, "where is my money?"

Chatterton immediately recognized defendant. He was introduced to defendant at a barbecue hosted the previous month at the house of a mutual friend, John Petite. Chatterton did not talk with defendant "too much" at the barbecue. He also recognized

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

defendant from another one of Petite's barbecues held earlier during the same month. Chatterton knew that defendant and Petite were "good friends" and had worked at Stater Bros. together.

Chatterton testified he did not owe defendant any money, but because of the gun pointed at his head, he retrieved his wallet and handed defendant approximately $800, which was all the money he had in the wallet. He said the money was "mostly tip money" he had earned from delivering pizzas, and he was saving the money for his house payment. After Chatterton handed the money to defendant, he placed his wallet, which contained his driver's license and ATM card, on a coffee table. A "pocketknife" with a three-inch blade was also on the coffee table.

While still holding the gun, defendant punched Chatterton in the face and told him to lie down so they could tie him up. Chatterton did as he was told and lay face down on the floor. While the other man went upstairs, defendant used one of Chatterton's shirts to tie Chatterton's hands behind his back, and to tie Chatterton's legs. He placed a sock in Chatterton's mouth and tied a camera bag strap around his head to keep the sock in place. He used a T-shirt to blindfold Chatterton. Next, defendant knelt down on Chatterton's back and ran a knife across the front of his throat. He then stabbed Chatterton in the back of his neck, causing a gash one inch long and one-quarter inch deep and leaving a scar.

Chatterton lay on the floor for several more minutes, until defendant and the other man left the house. After Chatterton heard a vehicle speed away, he managed to untie his hands and free himself. His wallet, which contained his driver's license and ATM card, was taken from the coffee table. The pocketknife was also taken. Nothing else was taken

from the house. After cleaning the stab wound and putting a bandage on his neck, Chatterton got dressed and left for work.

That night, Chatterton stayed at a coworker's house. He did not report the crimes to police until the following day. He testified he did not immediately contact the police because he wanted to leave his house as soon as possible and feared retaliation. He never returned to his home to live in it. On the day of the robbery, he reported to his bank that his ATM card had been stolen and told coworkers about the robbery. His coworkers convinced him to report the robbery.

Defendant did not testify and did not present any evidence in his defense. The parties stipulated that if Detective Mark Rodgers of the Twin Peaks sheriff's station was called as a witness, he would testify that he searched defendant's residence on April 22, 2004, and did not find a gun or any ammunition.

DISCUSSION

A. *Insufficient Evidence Supported Instructions on the Lesser Included Offense of Theft and on a Claim of Right to Any of the Property Taken*

Defendant contends the trial court prejudicially erred in failing to instruct the jury sua sponte on the lesser included offense of theft in count 1. He argues that, because the People never established *when* the wallet was taken, reasonable jurors may have inferred he took Chatterton's wallet as "an afterthought *after* Chatterton had been assaulted." He further contends he was entitled to an instruction that he had a "claim of right" to the $800 he took from Chatterton, based on his statements that Chatterton owed him money and "where is my money?" He reasons that, because a "claim of right" negates the

felonious intent element of both robbery and theft, reasonable jurors could have acquitted him of robbery and theft of the $800, and convicted him only of the theft of the wallet and its contents. We conclude that the evidence did not support instructions on theft or a claim of right to the $800 taken.

A trial court has a sua sponte duty to instruct on a lesser included offense "'if the evidence "raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense."'" (*People v. Moon* (2005) 37 Cal.4th 1, 25.) "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "'Theft is a lesser included offense of robbery, which includes the additional element of force or fear.'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

A "claim of right" is a good faith belief that one has a right to *the property taken*, and negates the felonious intent element of both robbery and theft. (*People v. Butler* (1967) 65 Cal.2d 569, 573, overruled on another ground in *People v. Tufunga* (1999) 21 Cal.4th 935, 956.) But there is insufficient evidence to support a claim of right instruction where the claim of right is not *specifically related* to the property taken. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145-1146; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021-1022.) Thus, a claim of right to money must relate to the specific money taken. (*People v. Tufunga, supra,* at pp. 945-950, 956.) A claim of right instruction also need not be given where the evidence supporting it is minimal and insubstantial. (*People v. Romo* (1990) 220 Cal.App.3d 514, 519.)

Here, there was no evidence whatsoever that defendant honestly believed he had a claim of right to the $800 he took from Chatterton. The $800 taken was all of the money that was in Chatterton's wallet. The evidence that defendant told Chatterton he owed him money and said "where is my money?" was very general -- it was in no way related to the $800 in Chatterton's wallet.

In addition, in view of strong public policy considerations disfavoring self-help through force or violence, a claim of right is not a defense to "*robberies perpetrated to satisfy, settle or otherwise collect on a debt, liquidated or unliquidated*—as opposed to forcible takings intended to recover *specific personal property* in which the defendant in good faith believes he has a bona fide claim of ownership or title . . . ." (*People v. Tufunga, supra*, 21 Cal.4th at pp. 939, 955-956, italics added.) Thus, even if the evidence showed that defendant had a good faith belief that Chatterton owed him $800 or any other amount of money, defendant was not entitled to a claim of right instruction.

Defendant further contends he was entitled to a lesser included offense instruction on theft based on his taking of Chatterton's wallet, because the People never established *when* the wallet was taken. He says he "could" have taken the wallet "as an afterthought *after* Chatterton had been assaulted as part of the defendant's claim-of-right to money or the independent knife-assault." He says "the knife-assault can be reasonably reconciled as 'punishment' for Chatterton's possession of defendant's money."

Essentially, defendant is arguing that his use of force or fear was not *motivated* by and was not *concurrent with* his intent to steal Chatterton's wallet. "To support a charge of robbery, '[t]he wrongful intent and the act of force or fear "must concur in the sense

that the act must be motivated by the intent." [Citations.]' [Citation.]" (*People v. Reeves* (2001) 91 Cal.App.4th 14, 53.) But "the existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense. . . ." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Here, there was insufficient evidence from which a jury comprised of reasonable persons could have concluded that defendant *did not* use force or fear to take Chatterton's wallet. That defendant "could" have taken Chatterton's wallet as an "afterthought" after he used force and fear on Chatterton is insufficient. There was no evidence whatsoever that defendant took Chatterton's wallet as an "afterthought" after "punishing" Chatterton for taking defendant's money. "Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense. [Citations.]" (*People v. Wilson* (1992) 3 Cal.4th 926, 941; *People v. Mendoza* (2000) 24 Cal.4th 130, 175.)

Finally, any error in failing to instruct on a claim of right or on the lesser included offense of theft was harmless. In view of the entire cause, including the evidence, there is no reasonable probability the jury would have (1) acquitted defendant of robbery and theft of the $800, or (2) found defendant guilty of the lesser included offense of theft of the wallet, had the instructions been given. (*People v. Breverman, supra,* 19 Cal.4th at p. 176.) The evidence that defendant used force and fear to take Chatterton's $800, wallet, driver's license, ATM card, and pocketknife was truly overwhelming.

B. *Sufficient Evidence Supports the True Finding on the Personal Use Enhancement*

Defendant contends there is insufficient evidence to support his enhancement in count 1 for personally using a firearm (§ 12022.53, subd. (b)) "because the evidence

failed to establish use of a real gun." (Capitalization omitted.) Defendant relies on Chatterton's testimony that he did not "know much about guns" and that the gun used in the robbery was never recovered.

In reviewing a claim of sufficiency of the evidence, we review "'"the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."'" (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) The same standard applies where the question is sufficiency of the evidence to support an enhancement (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484) and where the prosecution relies mainly on circumstantial evidence (*People v. Stanley* (1995) 10 Cal.4th 764, 792).

A person who personally uses a firearm in the commission of a robbery "shall be punished by an additional and consecutive term of 10 years." (§ 12022.53, subds. (a)(4) & (b).) "The firearm need not be operable or loaded for this enhancement to apply." (*Id.* at subd. (b).) Plainly, section 12022.53 applies to the personal use of a "real" firearm.

The character of the weapon may be shown by circumstantial evidence. (*People v. Green* (1985) 166 Cal.App.3d 514, 517.) "From testimonial descriptions of the weapon and its role in the commission of the crime, a jury may draw a reasonable inference of guilt. Reasonableness of the inference depends upon adequacy of the descriptions." (*People v. Hayden* (1973) 30 Cal.App.3d 446, 451-452, disapproved on another ground in *People v. Rist* (1976) 16 Cal.3d 211, 223, fn. 10.)

Here, substantial, circumstantial evidence showed that defendant personally used a firearm in the robbery. Chatterton testified he had a clear view of the gun. It was pointed at his head from a distance of only two or three feet. He did not know the exact type of gun because he did not "know much about guns." But he was certain the gun was a semiautomatic rather than a revolver. It was similar in size and shape to a gun shown to him by a deputy sheriff shortly after the offense, but the barrel of defendant's gun was rounder and a lighter silver color. The gun defendant used did not have an orange plastic plug on the end of it (as a fake gun would have) and looked "very real." There was no evidence that the gun defendant used was not a "real" gun.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.